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the children, save one son, who later became insolvent, joined in conveying to the widow. After the conveyance, creditors of such son filed a bill to reach his interest in the parcel not conveyed; the bill not mentioning the smaller tract. The widow and other children filed an answer and cross-bill setting up that the insolvent son had received his share of the estate by way of advancement. The matter was referred to a special commissioner, and, before he reported, the widow conveyed the smaller tract to defendant's father, who was one of her grantors, for life, with remainder in fee to defendant. The commissioner's report mentioned the smaller tract only as part of the assets of the deceased. Held that, where defendant who was an infant, was not brought in by any service of process, a decree, though acquiesced in by the widow, which adjudged that, subject to the widow's dower, the smaller tract should go to all the children, save the insolvent, was void for want of jurisdiction, the court, while having jurisdiction over the subject-matter, not having jurisdiction over the person of defendant; hence such decree was not binding on defendant.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1230; Dec. Dig. § 707.* 8 Va.-W. Va. Enc. Dig. 278.]

2. Equity (§ 464*)—Bill of Review—Nature.—On bill of review to set aside a judgment based on an earlier judgment set up by a plea of *res judicata*, the question whether the original judgment was procured by fraud should not be considered, where it appeared that it was void as to petitioner for want of service.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1129-1140; Dec. Dig. § 464.* 8 Va.-W. Va. Enc. Dig. 537; 2 Va.-W. Va. Enc. Dig. 390.]

Appeal from Circuit Court, Tazewell County.

Bill by M. M. Stevens and others against John Mervin Linkous. After a decree for complainants, defendant, by his guardian ad litem, moved for leave to file bills of review. From a decree denying leave, he appeals. Reversed and remanded with directions.

Harman & Pobst, of Tazewell, for appellant.

H. M. & T. R. Bandy, of Norton, and *Greever & Gillespie*, of Tazewell, for appellees.

NORFOLK & W. RY. CO. *v.* CITY OF BRISTOL.

Nov. 12, 1914.

[83 S. E. 421.]

1. Municipal Corporations (§ 648*)—Public Ways—Prescription.—

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

Where for more than 50 years the public had used a footpath across a railroad track at its intersection with a street as dedicated by the grantor of the railroad right of way, which path had been kept in repair, sometimes by the city and sometimes by the railroad, which use had been recognized by the railroad as a matter of right and not merely permissive, the city has acquired a way by prescription, regardless whether the original dedication was prior to the grant of the railroad right of way.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1421, 1422; Dec. Dig. § 648.* 4 Va.-W. Va. Enc. Dig. 356; 11 Va.-W. Va. Enc. Dig. 308.]

2. Railroads (§ 243*)—Highway Crossing—Flagmen—Statute—"Highways."—In Code 1904, § 1294d, cl. 61, authorizing a city to require a railroad company to station a flagman where any highway is crossed by the railroad, the term "highway" is used in its generic sense, and includes passageways used by foot travelers only.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 754, 757; Dec. Dig. § 243.* 4 Va.-W. Va. Enc. Dig. 125, 131.]

For other definitions, see *Words and Phrases*, First and Second Series, *Highways*.]

3. Railroads (§ 242*)—Crossings—Regulation of Public Ways—Path Acquired by Prescription.—A public footpath across a railroad track at its intersection with a city street is subject to regulation and control by the city council, regardless whether it was part of the highway as originally dedicated, or had become a public way by prescription.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 752, 754-757; Dec. Dig. § 242.* 4 Va.-W. Va. Enc. Dig. 128.]

4. Railroads (§ 98*)—Crossings—Duty to Maintain.—The fact that, because of the increase in a railroad's business, the continued maintenance of a public footpath across the track will seriously interfere with the railroad's operation does not affect the right of the public to have the path kept open.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 291, 292, 296; Dec. Dig. § 98.* 4 Va.-W. Va. Enc. Dig. 125.]

5. Railroads (§ 95*)—Crossings—Duty to Maintain.—Where a public footpath crossed a railroad at a point where the tracks were in a cut, and steps had been constructed down both sides of the cut, the railroad company, even if not required to maintain the steps, can be compelled to restore them after it has removed them for its own purpose.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 274-283, Dec. Dig. § 95.* 4 Va.-W. Va. Enc. Dig. 125, 130.]

6. Mandamus (§ 132*)—Subjects of Relief—Maintenance of Rail-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

way Crossing by Railroad.—Mandamus is the proper remedy to compel a railroad company to perform its duty to restore steps on a public footpath crossing its tracks and to maintain a flagman at that point as directed by the city council.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 266, 267; Dec. Dig. § 132.* 9 Va.-W. Va. Enc. Dig. 538.]

Error to Corporation Court of Bristol.

Mandamus by the City of Bristol against the Norfolk & Western Railway Company. Judgment for the plaintiff, and defendant brings error. Affirmed.

Lucian H. Cocke, of Roanoke, and *S. V. Fulkerson*, of Bristol, for plaintiff in error.

Floyd H. Roberts, of Bristol, for defendant in error.

WESTERN UNION TELEGRAPH CO. *v.* FIRST NAT. BANK
OF BERRYVILLE et al.

Nov. 12, 1914.

[83 S. E. 424.]

1. Commerce (§ 8*)—Interstate Commerce—Regulation by Congress—Effect.—Act Cong. June 18, 1910, c. 309, 36 Stat. 539 (U. S. Comp. St. 1913, § 8563 et seq.), which placed telegraph companies with respect to interstate messages in the same class as other common carriers, and made such companies liable under the federal law for any dereliction in duties, superseded state statutes imposing penalties for failure to promptly transmit messages, in so far as statutes apply to interstate messages.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. § 8.* 7 Va.-W. Va. Enc. Dig. 872; 13 Va.-W. Va. Enc. Dig. 181.]

2. Costs (§ 99*)—Imposition—Reversal on Appeal.—Where a bank, to whom a telegram was directed, sued for the benefit of the person injured by the delay in transmission of the message, and the fact was recognized at trial, the judgment providing that it was for the use of such person, the bank is on reversal on writ of error entitled, under Code 1904, § 3546, declaring that when a suit is in the name of one person for the benefit of another, if there shall be judgment for defendant's costs, it shall be against that other, to demand that any judgment for costs be rendered against the person for whose benefit the suit was brought.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 388-391; Dec. Dig. § 99.* 3 Va.-W. Va. Enc. Dig. 620.]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.